GIBSON DUNN

September 1, 2023

DEPARTMENT OF LABOR INITIATES RULEMAKING TO INCREASE COMPENSATION THRESHOLDS FOR MINIMUM WAGE AND OVERTIME EXEMPTIONS

To Our Clients and Friends:

On August 30, 2023, the U.S. Department of Labor issued a proposed rule to revise its regulations implementing minimum wage and overtime exemptions for executive, administrative, and professional employees, among others, under the Fair Labor Standards Act ("FLSA"). The proposal, if finalized, would revise the minimum wage and overtime exemptions issued by the Trump Administration in 2019, which have been in effect since January 1, 2020.

Among other things, the proposal would increase the compensation thresholds that are used when determining whether an employee qualifies for the executive, administrative, or professional exemptions. Under the Department's existing regulations an employee qualifies for an exemption if: (1) she is paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed; (2) the amount of salary paid meets a minimum specified amount; and (3) her job duties are primarily executive, administrative, or professional. The Department has periodically revised the minimum salary component of the test, most recently in 2019, when it set the minimum salary at $684 per week ($35,568 on an annual basis).

The Department's proposal would increase the salary threshold substantially. The Department proposes to increase the threshold to at least $1,059 per week, which is approximately $55,000 per year, representing a nearly 55 percent increase over the current threshold. The proposal also leaves open the possibility that the Department might use more recent wage data when it finalizes the rule, which means the compensation thresholds could easily be as high as $1,140 or $1,158 per week, or approximately $60,000 per year. (A higher threshold applies under state law in only a handful of states, such as California which requires that exempt employees earn at least $1,240 per week.) These increases are the result of the Department's proposal to tie the compensation thresholds to the 35th percentile of wage survey data of full-time salaried workers in the lowest-wage Census Region—as opposed to 20th percentile of wage survey data of full-time salaried workers in the lowest-wage Census Region and of retail workers nationally.

The proposal would also increase the compensation threshold for the highly compensated employees exemption. Employees earning at least $107,432 annually currently qualify for this exemption if they regularly perform at least one executive, administrative, or professional duty. The Department proposes to increase the compensation threshold to $143,988, an increase of approximately 34 percent.

These changes to the Department's compensation thresholds would, if implemented, have significant consequences for many employers. It is estimated that the changes will expand the number of workers who would be eligible for overtime wages by at least 3.6 million.

The Department also proposes to automatically increase the compensation thresholds every three years to account for changes in wage survey data collected by the Bureau of Labor Statistics. If implemented, the automatic increase mechanism would likely result in significantly higher compensation thresholds in the coming years.

Increases to the compensation threshold, including automatic increases, were included in the Obama Administration's 2016 rule. That rule, which would have increased the compensation threshold to $913 per week ($47,476 on an annual basis), was enjoined before it took effect. It was later struck down by the U.S. District Court for the Eastern District of Texas on the grounds that the Department's reliance on salary thresholds to the exclusion of an analysis of employees' job duties exceeded the Department's authority under the statute. A similar challenge should be expected to any final rule resulting from the Department's new rulemaking, particularly in light of Justice Kavanaugh's dissent in *Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39 (2023), which suggested that the Department's compensation threshold test may be inconsistent with the FLSA.

Interested parties will have 60 days to submit comments on the proposed rule after it is published in the Federal Register. The Department may issue a final rule as soon as early-to-mid 2024. As noted, legal challenges are possible once a final rule is adopted.

The following Gibson Dunn attorneys assisted in preparing this client update: Eugene Scalia, Jason Schwartz, Katherine Smith, Andrew Kilberg, and Blake Lanning.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment or Administrative Law and Regulatory practice groups, or the following authors and practice leaders:

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